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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1968

NO. 1095

Jerry J. Acuff, Garner E. Allen, George J. Bullock, Corbett W. Carlisle, C. L. Carter, Donald W. Carter, George W. Dean, Dewey R. Faircloth, M. T. Frazier, A. J. Giddens, Bobby Harvison, Charles W. Hays, Jimmy D.Hester, Mike Kittrell, T. W. Kittrell, Phillip Lee, Robert S. McCoy, Herbert Ray Meitzler, D. W. Naramore, William I. Piatt, A. C. Pugh, Jr., James W. Richardson, L. T. Robbins, J.I. Russell, Charles W. Schuler, B. R. Singletary, R. C. Skidmore, Donald L. Ward, J. D. Whitman, Bobby N. Whitten, William A. Winters,

Petitioners,

v.

United Papermakers and Paperworkers, AFL-CIO; International Brotherhood of Pulp, Sulphite and Papermill Workers, AFL-CIO; and Scott Paper Company, Southern Division,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF
APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, SCOTT PAPER COMPANY, SOUTHERN DIVISION IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1968
No. 1095

JERRY J. ACUFF, et al.,
Petitioners,

Vs.

UNITED PAPERMAKERS AND PAPERWORKERS, AFL-CIO, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT, SCOTT PAPER COMPANY, SOUTHERN DIVISION, IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported at 404 F. 2d 169 (App. 1a, of Petition). No opinion was rendered by the District Court, but the Court order denying intervention was entered on January 31, 1968 (R. 63).

JURISDICTION

Respondent, Scott Paper Company, is satisfied that jurisdiction is conferred by 28 U.S.C. § 1254(1). The United States Court of Appeals entered judgment on November 27, 1968.

QUESTIONS PRESENTED

1. Do grievants, whose rights are regulated by the terms of a collective bargaining agreement, have an unqualified Constitutional right to be represented at an arbitration by counsel of their own choosing where there is no claim that representation by the exclusive bargaining representative was arbitrary, discriminatory, or in bad faith?

2. Do unsuccessful grievants, in an arbitration conducted under the terms of a collective bargaining agreement, have a right to intervene for the purpose of setting aside the arbitration in a suit brought pursuant to Section 301 L.M.R.A., 29 U.S.C. §185, to compel arbitration, where the arbitration has been concluded and the grievants present no claim that their representation was arbitrary, discriminatory, or in bad faith?

3. Was the Petition timely filed within the meaning of the rules of the Supreme Court?

STATUTES INVOLVED

The provisions of the Labor Management Relations Act, §301, 29 U.S.C. §185, are set forth in Appendix A hereto.

STATEMENT

On January 31, 1967, the United Papermakers and Paperworkers and International Brotherhood of Pulp, Sulphite and Paper Mill Workers, both duly designated representatives of employees at Scott Paper Company, filed a complaint in the United States District Court for the Southern District of Alabama seeking to compel arbitration of grievances arising out of the discharge of certain employees for engaging in a wildcat

strike during November, 1966. (R. 1-13). After filing a Motion to Dismiss (R. 13, 14), Scott Paper Company entered into a stipulation with the unions to arbitrate the grievances, and an impartial arbitrator was selected by the parties. (R. 14-16). Upon the filing of the Stipulation the Court entered an order directing arbitration on May 24-26, 1967. (R.17-18).

Arbitration of the grievances was held on May 24-27, 1967, and a decision rendered by the Arbitrator on August 17, 1967. (R. 21-60). Exhibit A to the original Complaint (R. 10) is a copy of the Collective Bargaining Agreement and provides that "the decision of the arbitrator shall be final and binding on all parties." (R. 6).

On November 14 and 15, 1967, certain employees filed Motions to Intervene in the action (R. 18,60) and attached thereto proposed complaints. (R. 19, 61). Applicants for intervention alleged jurisdiction of the Court under Title 9, U.S.C. §10, stating that the arbitrator denied in whole and in part the grievances of the employees. The complaints also alleged that the arbitrator denied the employees' written and oral motions "...for individual and special counsel to represent..." them and were only allowed representation by union counsel (R. 19,62). The employees sought to have the award vacated and to have a rehearing with special counsel to represent the employees. (R. 20,62).

REASONS FOR REFUSING THE WRIT

This case presents no compelling issue for resolution by this Court since this decision is in full accord with national labor policy as enunciated by both Congress and this Court's decisions. The Court of Appeals in its decision dismissing the appeal from the order of the District Court denying Petitioners' Motions to Intervene simply implemented that policy. The issue

sought to be raised by Petitioners finds no factual support in the record but is a pure question of law: Does a grievant in a labor arbitration, absent an allegation of arbitrary, discriminatory, or bad faith action by his collective bargaining representative, have the constitutional right to be represented by counsel of his own choosing to the exclusion of his certified representative?

This Court in *Vaca v. Sipes*, 386 U.S. 171 (1967), answered this question negatively. Thus, the decision of the Court of Appeals is correct. Neither a conflict of decisions nor an important federal question is presented for review.

The decision below is correct.

a. Right to Counsel

In dismissing the appeal from the district court's order the court of appeals decided that from the record before it, there was no support for a claim of arbitrary, discriminatory, or bad faith action on the part of the certified bargaining representative and Petitioners had shown no basis to support intervention as of right, Rule 24, F.R. Civ. P.

The logic of the opinion of the Court of Appeals is unassailable. Reasoning from the proposition that since an employee cannot "compel arbitration" regardless of the merit of his grievance, *Vaca v. Sipes, supra*, "it would be paradoxical in the extreme if the union could not be authorized to assume responsibility for a grievance it did pursue, without the intervention of the individual union members immediately concerned." 404 F. 2d at 171.

Collective bargaining with the certified representative does

not come to an end with the negotiation of the agreement, but continues on to encompass the grievance procedure. *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Thus, the duty imposed on an employer to bargain only with the certified representative continued through to arbitration and the employer in meeting this obligation must arbitrate those grievances called for in the collective bargaining agreement. Scott Paper Company fulfilled this obligation, as did the Unions, when they arbitrated the grievances of Petitioners.

Petitioners seek to place the role of collective bargaining, and specifically arbitration, in the context of the normal contractual relationship between parties. But, as was pointed out in the *Steelworkers* case, *supra*, "this is not true of the labor agreement." 363 U.S. at 580. Every labor agreement is subject to federal regulation. An employee's individual rights are subordinated to the terms of the agreement reached between his representative and the employer, "for arbitration is a matter of contract...." *Id.* at 582.

It is not so simple to say that an employee has a right to counsel of his own choosing during the grievance procedure. To accept this postulate, as stated by Petitioners, is to ignore the entire history of the collective bargaining process which has fashioned the labor policy of this nation.

Steel v. Louisville & N.R.Co., 323 U.S. 192 (1944) recognized the reduction in individual rights where the collective bargaining process is brought into play. Admittedly, the actions of the union in its role as exclusive representative are not unlimited, *Vaca v. Sipes, supra*, and the representative is required to fairly represent its membership. *Ford Motor Co. v. Huffman*, 345 U.S. 330 (1953).

Inevitably differences arise in the manner and degree to

> which the terms of any negotiated agreement affect individual employees and classes of employees. The mere existence of such differences does not make them invalid. The complete satisfaction of all who are represented is hardly to be expected. A wide range of reasonableness must be allowed a statutory bargaining representative in serving the unit it represents, subject always to complete good faith and honesty of purpose in the exercise of its discretion. 345 U.S. at 338.

Does the record present any question of arbitrary, discriminatory or bad faith action by the Unions? Nothing in the record,either before or during the arbitration, reveals any such claim. It was only after the decision of the arbitrator was rendered do we have any *suggested* claim of arbitrary, discriminatory or bad faith action by the Unions, and then only by tracking the language of Rule 24 (a) F.R. Civ. P., by utilizing the words of the statute -- inadequate representation, and this only is found in the Motions to Intervene. On pages 18 and 60 of the Record, in Petitioners' Motions to Intervene they allege that "...the Applicants' interests have and may continue to be inadequately represented by the present plaintiffs and the Applicant will or might be bound by the final disposition or confirmation of the arbitration action herein." Rule 24(a)(2) F.R. Civ. P. provides:

> (a) Intervention of Right. Upon timely application anyone shall be permitted to intervene in an action . . . . (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

There is no allegation in the *complaint* for intervention that the Unions failed to act in good faith or without an honest purpose. The sole claim in the *complaint* is that Petitioners were denied the right to special counsel.

The question of right to individual counsel was considered in *Bailer v. Local 470, Teamsters*, 400 Pa. 188, 161 A. 2d 343 (1960) where an employee requested that he be allowed to have his own counsel represent him. His complaint alleged a breach of the union's obligation of good faith representation. In disposing of this contention the Court stated:

> In commissioning the appellee Local as his bargaining agent in negotiations with the employer Corporation, appellant has entrusted certain responsibilities to the Local, one of which is to represent the appellant at grievance proceedings. Moreover, under the terms of the applicable collective bargaining agreement, the appellee Local is the party specifically designated to bring employee complaints before the arbitrator. Were each aggrieved employee permitted to be represented at an arbitration by private counsel who has the right to question witnesses and otherwise participate fully in the proceedings, the Local, as a trustee representative, would be effectively unable to perform its duty. Union officials and private counsel might well be at complete loggerheads over what witnesses to present, in what order to present them, the efficacy of cross-examination of a particular witness, or over any one of the myriad decisions that enter into the conduct of a trial proceeding. Moreover, as a statutory bargaining representative under the Taft-Hartley Act, the appellee Local must at all times act in in the interests of all those within the shelter of its protection....Therefore, on many occasions the outlook

with which private counsel and union representatives would approach a policy decision in the course of conducting a trial might be radically at variance. It was to forestall this type of conflict that the Corporation agreed to negotiate on grievances solely with union representatives. If the appellee Local had granted the appellant's request, it would have been in breach of its own obligations under the collective bargaining agreement. We hold that the denial of such a request does not in any way indicate a breach of duty on the part of the appellee Local.

Vaca teaches that an employee has no absolute right to compel arbitration of his grievance. 386 U.S. at 191. Surely if an employee has no absolute right to compel arbitration, he has no absolute right to have special counsel. If such a right existed would we not have a return of the "...individual grievant to the vagaries of independent and unsystematic negotiation."? 386 U.S. at 191.

Commonwealth Coatings Corp. v. Continental Gas Co., U.S. ,89 S. Ct. 337 (1968) does not dictate a differing result. It requires impartiality in arbitration. But this is nothing more than should be required and fully comports with traditional concepts of justice. However, the traditional concepts of justice applied in criminal cases may be different from those applied in civil litigation, just as the rules governing commercial contracts differ from those negotiated within the framework of the collective bargaining process.

No claim is made that the Unions did not represent all discharged employees equally and impartially so that no question is presented involving antagonistic claims between two groups of employees. Petitioners contend that since the

arbitration proceeding is "insulated from appellate review," they must be allowed to "use their own counsel." (Petition, 8). In fact the proceeding is not insulated from review and Petitioners needed only to show that the Unions had in fact acted arbitrarily, discriminatory, or in bad faith. This they failed to do.

Petitioners argue that the First Amendment to the Constitution as expressed in *U.M.W. v. Illinois State Bar Ass'n*, 389 U.S. 217 (1967) (Petition, 8), guarantees their right to be represented by counsel of their own choosing. But any rights found abridged in that case do not carry over to the instant case. The *U.M.W.* case as well as *Railroad Trainmen v. Virginia*, 377 U.S. 1 (1964), involved action to limit the unions from selecting or recommending counsel to represent their membership. Thus, in balancing state interests against rights guaranteed by the First Amendment, the Court found that State interest must yield. In balancing the right to counsel as against the Union's right to control the arbitral process, the individual right must yield. To preserve industrial harmony the employees' right to chosen counsel must yield to the paramount right of representation by the bargaining representative. *Local 12, U.R.W. v. N.L.R.B.*, 386 F.2d 12 (5th Cir. 1966). The choice again must be made in implementing national labor policy.

> The facts of this controversy once again present the critical challenge of striking a meaningful balance, consistent with existing labor policy, between individual employees rights and the continued effectiveness of the collective bargaining process. *Id.* at p.16.

Petitioners agree with the rationale of *Vaca* but contend that its application stops when the parties reach the stage of

arbitration. It is submitted that this attempted application is wholly erroneous because the grievance process does not cease at that point. The reasons given in *Vaca* for allowing a union to settle grievances short of arbitration, and set forth in footnote 11 on page 9 of the Petition, are just as applicable and probably more important once the matter reaches arbitration. To illustrate the burden which could be placed upon the arbitration process if Petitioners' contentions were accepted it is only necessary to consider the effect of each individual grievant in this case being represented by his chosen counsel. In this case there could have been 63 attorneys representing 63 grievants, not to mention counsel for the Unions. "This would greatly increase the cost of the grievance machinery and could so overburden the arbitration process as to prevent it from functioning successfully." *Vaca v. Sipes, supra* at 192.

Humphrey v. Moore, 375 U.S. 335 (1964) does not require anything more than *Vaca*, and expressly recognizes the right of a union to control the grievance process subject to good faith and honesty of purpose.

> As far as this record shows, the union took its position honestly, in good faith and without hostility or arbitrary discrimination....

This finding was similarly present in the court of appeals holding that "nothing is alleged that plausibly suggests bad faith on the part of the union....", 404 F. 2d at 171, and Petitioners "...have not yet suggested what they could have added to the hearing by way of facts or theory if they had been differently represented." *Humphrey v. Moore*, 375 U.S. at 350.

Petitioners question the holding of the court of appeals that the representation of Petitioners was adequate, 404 F. 2d

at 171, on the theory that the record was devoid of anything showing adequacy; the only reference in the record being the word "inadequate" in the Motions to Intervene. On the other hand, Petitioners would have this Court enter a decision, remanding the case to the court of appeals on the basis of inadequate representation by its exclusive bargaining representative on the basis of a record that is just as barren of any allegation, much less fact, that these representatives did not honestly, impartially and in good faith present the grievances of these employees.

b. Right to Intervene

Petitioners sought intervention as of right under Rule 24(a), F. R. Civ. P. almost 90 days after the rendition of the arbitrator's award. The original suit to compel arbitration was filed in the District Court on January 31, 1967. The unions and Scott Paper Company agreed to arbitrate and on May 17, 1967 the Court ordered arbitration to proceed on May 24, 1967. At no time subsequent to January 31, 1967, through the entering of the award, did Petitioners attempt to intervene to claim they were not adequately represented by the unions. After entry of the award Petitioners claim in their motions that they "have and may continue to be inadequately represented" by the unions.

Unquestionably, the motions to intervene were not "timely". Intervention of right requires a "timely application." It was only after the adverse award that Petitioners brought to the Court's attention their claim of "inadequate representation" by the Unions. As was pointed out in *S.E.C. v. Bloomberg*, 299 F. 2d 315 (1st Cir. 1962), this is not permissible.

The determination of whether a petition is timely involves

> various competing considerations, not the least of which is whether the applicant was in a position to seek intervention at an earlier stage. See, e.g., American Brake Shoe & Foundry Co. v. Interborough Rapid Transit Co., 112 F. 2d 669 (2 Cir. 1940); Mullins v. DeSoto Securities Co., 2 F.R.D. 502 (W. D. La. 1942), appeal dismissed 136 F. 2d 55 (5 Cir. 1943). We believe that in this case with the position of the Commission already firm and having brought the implications thereof to the attention of the court at the July 26 hearing, it was clearly in a position to seek -- and in our view should have sought -- intervention long before September 8. Procrastination is never admirable; where, as here, the fate of a corporate reorganization hangs in the balance, it is intolerable. Thusly viewed, we cannot say that the district court abused its discretion in denying the Commission's motion to intervene.

Here the employees procrastinated for ten months, and then only sought intervention when the suit was moot. Here the entire arbitration process is concluded.

The only "interest" in the arbitration is held by the unions and the company as parties to the collective bargaining agreement. *Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965); *Black-Clawson Co. v. I.A.M., Lodge 355,* 313 F. 2d 179 (2d Cir. 1962). The employees were and are represented by their unions who did protect their interest in the arbitration. No claim is made that the interest of the union was antagonistic to the interests of the employees. Intervention under Rule 24(a) does not afford these employees the relief they seek, since they do not come within its terms.

c. Timely filing of the Petition.

Respondent, Scott Paper Company,shows unto the Court

that the judgment of the Court of Appeals for the Fifth Circuit was entered on November 27, 1968, with opinion of the same date. The petition was filed on February 28, 1969, more than 90 days from entry of the judgment by the Court of Appeals. The period for applying for a writ of certiorari has not been extended by a justice of this Court, Title 28, U.S.A. §2101(c) and Rule 22 Supreme Court Rules. Petitioners application for a writ of certiorari is not timely and should be denied.

CONCLUSION

The decision of the Court of Appeals involved resolution of two issues: (1) Petitioners had made no allegation or showing of arbitrary, discriminatory or bad faith action on the part of their exclusive bargaining representative, and (2) Petitioners showed no right to intervene under Rule 24(a), F. R. Civ. P. No compelling Constitutional issue is involved requiring resolution by the Court, the issue having been settled in previous decisions, which the Court of Appeals correctly applied in dismissing the appeal.

It is respectfully submitted that the questions here raised by Petitioners are not of the importance to warrant review by this Court and the Petition for Writ of Certiorari should be denied.

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PROOF OF SERVICE

I, T.K. JACKSON, JR., the attorney for the Respondents herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of , ,1969, I served a copy of the foregoing brief for Respondents in opposition on Jerry J. Acuff, et al., Petitioners herein, by mailing a copy of the same in a duly addressed envelope, with first class postage prepaid, to Melvin L. Wulf and Eleanor Holmes Norton, counsel for Petitioners, at their office address, 156 Fifth Avenue, New York, New York, and to Reber Boult, Jr. and Charles Morgan, Jr., attorneys for the Petitioners, at their office address, 5 Forsyth Street, Atlanta, Georgia, and to Otto E. Simon, attorney for Petitioners, at his office address, Simon & Wood, 1010 Van Antwerp Building, Mobile, Alabama and to Warren Woods, attorney for Respondent Unions, at his office address, Perpetual Building, 1111 E. Street, N.W., Washington, D.C., and to Willis C. Darby, Jr., attorney for Respondent Unions, at his office address, 154 St. Louis Street, Mobile, Alabama.

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APPENDIX A

Section 10 Title 9 U.S.C.

In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration --

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators.

Section 1254 (1) Title 28 U.S.C.

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

Section 2102 (c) Title 28 U.S.C.

(c) Any other appeal or any writ of certiorari intended to bring any judgment or decree in a civil action, suit or proceeding before the Supreme Court for review shall be taken or applied for within ninety days after the entry of such judgment or decree. A justice of the Supreme Court, for good cause shown, may extend the time for applying for a writ of certiorari for a period not exceeding sixty days.

Section 185(a) Title 28 U.S.C.

(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.